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the accident, and although, it was said, an action might lie against the latter.

And see *Brehm v. The Great Western Railway*, 34 Barb. 274, and *Mott v. The Hudson River R. R.*, 8 Bosw. 345. In the latter case, the plaintiff's buildings were on fire; and while the firemen were endeavoring to extinguish it, the cars of the defendant passed over the hose, cutting and rendering it unfit for use, in consequence of which the buildings were consumed. It was held, that if the act were done by the concurring negligence of the defendant and the firemen, in such sense that the hose would not have been cut if either had been free from negligence, the plaintiff was entitled to recover.

Upon all these considerations, we are of the opinion that there was no error in the instructions of the court, and that the plaintiff may maintain trespass for the injury which he has sustained.

Supreme Judicial Court of New Hampshire.

RAY v. ADDEN.

A husband is not liable to an attorney for professional services rendered his wife in defending a libel for divorce by the husband against her upon the ground of adultery, even though such defense may prove successful.

ASSUMPSIT, by Ossian Ray against Edward F. Adden, for professional services rendered defendant's wife at her request. Defendant commenced a libel for divorce against his wife, for the alleged cause of adultery, which was entered in court at July term, 1866, for Coos county, and continued from term to term until the March adjourned term, 1870, when, upon hearing, said libel was dismissed without prejudice. At the July term, 1867, on application of the libellee, an allowance of thirty dollars was granted her by the court to aid her in defending said libel, which was paid by the defendant. Plaintiff claims and offers to prove that from the time of filing said libel, said defendant's wife has been and is destitute of property and unable to pay her counsel, who has received nothing toward his services and advances, except said thirty dollars.

The services of counsel were necessary in defending the libel, and plaintiff's claim is wholly for such services and advances. The defendant never employed the plaintiff, nor agreed to pay said claim; but the plaintiff contends that defendant is bound to pay the same as for necessities for his wife.

It was agreed that after the opinion of the court should be obtained on the foregoing case, it might be discharged and tried by the jury if either party so elect.

Questions of law reserved for the whole court.

Ray & Ladd, for plaintiff.

Fletcher, Heywood & Crawford, for defendant.

SARGENT, J. The liability of the husband upon the contracts of his wife must rest either upon the ground of his assent, or approval of the same, or because the law of marriage has imposed upon him the duty of supplying her with necessities during the marriage, until she has relinquished or forfeited a right to claim them, by her own voluntary act, misconduct, or crime.

The case finds that here was no promise or assent on the part of the husband to pay this plaintiff, and this claim is put upon the ground of necessities.

That the husband is liable for necessities thus furnished to the wife, such as necessary food, drink, clothing, washing, physic, instruction, and a suitable place of residence, with such necessary furniture as is suitable to her condition, there is no doubt. *Whittingham v. Hill*, Croke Jac. 494; *Hunt v. DeBlaquiere*, 5 Bing. 550; 2 Smith's L. Cas. 364; *Morrison v. Holt*, 42 N. H. 478.

It is also held in *Shepard v. Mackoul*, 3 Camp. 326, where the wife exhibited articles of the peace against her husband, and employed an attorney to assist her, that the husband would be liable to such attorney for such services, provided such measures were necessary. If the conduct of the husband was such that she must necessarily resort to such measures in order to preserve life and health—to protect herself from imminent danger to life or limb or health¹—then

¹ See *Harris v. Lee*, 1 Peere Wms. 482-483, for a marked illustration of the rule in Equity; see also *Marlow v. Pufield*, *id.*, 559.

the necessity existed. To the same effect are *Shelton v. Pendleton*, 18 Conn. 417; *Morris v. Palmer*, 39 N. H. 123; *Smith v. Davis*, 45 N. H. 566-70, and cases cited.

In this case the husband applied for the divorce on the ground of the adultery of the wife. She opposed the granting of the divorce, and employed plaintiff, who rendered her the necessary aid in making her defense; and the case finds that he so far succeeded in the defense as to procure the libel to be dismissed without prejudice.

This entry "dismissed without prejudice," indicates that the libel was *not* dismissed upon the *merits* of the case, upon the ground that the evidence showed the libellee to be innocent of the charge made against her, but for some insufficiency in the allegations, or in the service of the libel (see rule 4, June adjourned term, 1865), where it might be proper to allow the libellant to bring a new libel for the same cause. This would not be done in any case where the evidence showed the libellee to be free from fault and from suspicion. Therefore the fact of this entry shows that the libellant failed upon some technical point in the case, rather than that the libellee succeeded in proving her innocence of the charge made against her.

But however that may be, it would certainly be a new discovery if the attorney for the libellee has a valid claim against the husband for the services thus rendered the wife. The court has long been in the habit of granting aid to the libellee in such cases, when they apply and furnish the proper evidence, by way of interlocutory order, by making an allowance to the wife to aid her in making a defense. When the wife is the libellant, it is not customary to make her any allowance in that way, but to consider the matter of her necessary expenses, in awarding alimony.¹

But when the wife is libellee, such allowances are made, and the husband is ordered to pay to his wife some reasonable sum to assist her in making defense. This has been done, because it was supposed to be the only way in which the husband could be compelled to defray the wife's necessary

¹ See 49 N. H. 7 (reporter's note) as to manuscript opinion by GILCHRIST, C. J

expenses; neither party by our practice recovers costs in a divorce case. But no interlocutory order in such a case could be necessary, if the husband is liable to the attorney of the wife for all such services as he may render. The order which the court made in this case was a work of supererogation. The libellee's counsel might as well recover the whole in one suit, as to obtain an order of court for part, and be obliged to sue for the residue.

One thing is very certain, that the court never understood that the counsel could recover for his services against the husband of the libellee in such a case, else they would not have been making orders of allowance to the libellee to enable her to make her defense. She could make such defense without such aid if she could charge her husband with the whole expense of her defense. We think the authorities fully justify the court in the views they have taken, and are decisive to the point that the plaintiff in this case cannot recover. The reasoning in *Morrison v. Holt*, 42 N. H. 478, where it was held that the husband was not liable to the wife's counsel for services rendered her in obtaining a divorce from her husband on the ground of his adultery, is much of it equally applicable here. To the same point is *Johnson v. Williams*, 3 Iowa 97, and *Shelton v. Pendleton*, 18 Conn. 417.

And in Bishop on Mar. and Div., sec. 571, it is said that the husband is not "liable to the legal adviser whom she (the wife) may employ, either in prosecuting or defending a divorce suit." The reason stated is, that she cannot bind her husband for anything unless it be necessary for her safety; and he adds: "But it is very necessary for her safety, *as wife*, either to obtain a divorce from him, or to resist his obtaining one from her."

And in *Coffin v. Dunham*, 8 Cush. 404, it is expressly held that a husband is not liable for services rendered to his wife by a counselor at law, in successfully defending her against a libel for divorce filed against her by her husband. This would seem to be directly in point; and so is *Wing v. Hurlburt*, 15 Vt. 607. It seems that Hurlburt and his wife had filed cross libels for divorce, and that Wing had been coun-

sel for the wife in both cases, and made his charges in the case in which she was libellant, and also in the case in which she was libellee, and sued the husband for both these classes of items. WILLIAMS, C. J., in the opinion, says: "But to dissolve the bond of matrimony between them on her request, or to resist his petition for that purpose, cannot he considered as necessary for her safety or preservation, so as to enable her to procure professional assistance therefor on his credit and at his cost." "No case," he says, "is found where this was ever attempted."

But in this State both have now been attempted—the one in *Morrison v. Holt*, 42 N. H. *supra*, and the other in this case; and our judgment is that, as in the former case so in the latter, the attempt must fail.

Unless the case is discharged according to its terms, there must be

Judgment for the defendant.

*United States District Court. District of Kansas. In
Bankruptcy.*

MATTER OF J. R. STILWELL.

A creditor who has a mortgage on a bankrupt's homestead, as security for his debt, may prove his debt and vote for an assignee.

The question is fully stated in the opinion of the court, which was delivered by

DELAHAY, J.—The question submitted to the court in this case is, whether a creditor having a mortgage upon the homestead of the bankrupt, to secure his demand, has the right to prove his demand and vote on the choice of an assignee of the bankrupt's estate.

The 13th section of the bankrupt law provides who may legally vote for an assignee in the following language, to wit: "The choice to be made by the greater part in value and in number of the creditors *who have proved their debts.*"